BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICKY L. PARRISH	)	
Claimant	)	
VS.	)	
	)	Docket No. 233,990
RUSSELL STOVER CANDIES	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the June 20, 2000 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on December 13, 2000.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared on behalf of claimant. Brendon W. Webb of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a series of traumas through claimant's last day of work which resulted in a permanent injury to claimant's low back. In the June 20, 2000 Award, Judge Benedict found that claimant left her job with respondent because she could not perform the work due to her injury. Although claimant advised respondent she was quitting due to her back, she did not ask for and respondent did not make an offer to claimant of an accommodated job. The Judge further found that after claimant quit her job with respondent she failed to make a good faith effort to find appropriate employment. Therefore, the Judge imputed a wage based upon claimant's ability to earn wages and found claimant's wage loss to be 22.4 percent. The Judge also found claimant had failed

to prove her task loss. Averaging the 22.4 percent wage loss with a 0 percent task loss, Judge Benedict awarded claimant an 11.2 percent permanent partial general disability.

Claimant contends Judge Benedict erred. Claimant argues that she made a good faith effort to find appropriate employment and, therefore, should be awarded a work disability based upon her actual wage loss. In addition, claimant contends that she has proven a 76 percent task loss. Conversely, respondent argues that claimant should be denied benefits, but if claimant is found to have sustained a compensable injury, then claimant should be limited to an award based upon her percentage of functional impairment because she quit her job with respondent without asking for accommodation and because she retains the ability to earn at least 90 percent of the gross average weekly wage she was earning at the time of her alleged accidental injury.

The issues before the Appeals Board on this review are whether claimant suffered an injury arising out of and in the course of her employment with respondent and the nature and extent of claimant's disability, including whether claimant's wage loss should be based upon her actual earnings or if, instead, a wage should be imputed based upon claimant's ability to earn, and whether a task loss has been proven.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Appeals Board concludes the ALJ's Award should be modified. The Board agrees with the ALJ that claimant has proven that she suffered personal injury by accident as alleged. The Board otherwise adopts the findings and conclusions set forth by the ALJ in his Award only to the extent they are not inconsistent with the findings and conclusions contained herein.

2. Claimant aggravated a preexisting degenerative condition in her spine while working for respondent. She left work due to her injury. Claimant last worked for respondent on or about May 15, 1998. Therefore, May 15, 1998 is the date of accident for purposes of this award.[1]

3. After receiving 68 weeks of temporary total disability compensation (TTD) while undergoing medical treatment, claimant was found to be at maximum medical improvement (MMI) and was released with permanent restrictions. Respondent was not able or not willing to accommodate those work restrictions and never offered to return claimant to work

4. Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e, which provides in part:

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[1] Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[2] and Copeland.[3] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[4]

5. The Kansas Appellate Courts have further interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[5] Additionally, permanent partial general disability benefits

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[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] Copeland at 320.

[5] *See, e.g.,* Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* ___ Kan. ___ (1999), and Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998).

are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.

6. Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith. In providing accommodated employment to a worker, Foulk is not applicable where the accommodated job is not genuine[6] or not within the worker's medical restrictions,[7] or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.[8]

7. Dr. Terrence Pratt, one of claimant's authorized treating physicians, diagnosed chronic low back pain with right sacroiliac dysfunction, a component of myofascial pain, with some degenerative changes, but no lumbosacral radiculopathy. This opinion of no lumbosacral radiculopathy, however, appears to conflict with his findings on physical examination. He opined that claimant should be at least able to perform sedentary work and perform lifting tasks between 10 and 25 pounds. He recommended she avoid frequent low back bending. Dr. Pratt reviewed the task list prepared by Richard Santner and found claimant could not perform 13 of 54 tasks identified, for a 24 percent loss. Using the task list prepared by Monty Longacre, he opined claimant could not perform 16 of 41, or 39 percent, of the tasks identified. Using the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Pratt rated claimant's functional impairment at 5 percent, of which he said 3 percent was related to her preexisting condition. Although it is not entirely clear, it appears Dr. Pratt was of the opinion that claimant's preexisting condition was rateable by history as a 3 percent impairment under the AMA Guides before her aggravation while working for respondent. It was his understanding that claimant was still having intermittent back pain when she went to work for respondent, but not to a significant degree.

8. Dr. Sergio Delgado examined claimant on November 10, 1999. His diagnostic impression was a right sacroiliac strain. He gave claimant restrictions to alternate sitting and standing every two hours and avoid repetitive lifting from the floor in excess of 15 pounds and from waist to overhead level not in excess of 25 pounds with occasional lifting of 30 pounds from the floor and 40 pounds from waist to overhead level. In addition, she was to avoid repetitive bending, stooping or twisting. Dr. Delgado reviewed the task list prepared by Monty Longacre and opined that claimant could not perform 31 of the 41 tasks described, for a loss of 76 percent. He rated claimant's functional impairment as 5 percent

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[6] Tharp v. Eaton Corp., 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[8] Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

under the 4th Edition of the AMA Guides, all of which he attributed to claimant's work with respondent if claimant was symptom free when she began working for respondent. But if, instead, claimant was experiencing back pain when she started with respondent, Dr. Delgado would probably apportion 50 percent of claimant's impairment to her preexisting condition. Dr. Delgado did not say that claimant had a ratable impairment under the AMA Guides before her employment with respondent.

9. Claimant was interviewed by vocational expert Monty Longacre. He believed claimant had the ability to earn $6.25 per hour doing clerical type work full time particularly if she completed the secretarial training program. Another vocational expert, Richard Santner testified claimant could earn $6-$7 per hour doing clerical work within Dr. Pratt's restrictions. Without the restriction against prolonged standing which would limit claimant to sedentary work, Mr. Santner believed claimant's range of wage earning ability would be about the same even if she was not retrained to do clerical work, by instead performing work in the food service area, such as waitressing. Sometime in March 2000, claimant was hired to do clerical work for a church earning $6 an hour for 12 hours a week. She was still working there at the time of the Regular Hearing on April 20, 2000. Based upon the record as a whole, including the testimony of claimant, and the restrictions recommended by Dr. Delgado and Dr. Pratt, the Board believes claimant should be limited to sedentary employment. Dr. Pratt, in his task loss opinion, found claimant retained the ability to perform tasks that required constant standing and walking. The task loss opinion given by Dr. Delgado which includes a restriction against constant standing is, therefore, the most credible.

10. After she was released from treatment and given permanent restrictions, claimant looked for work. She was unsuccessful, however, in finding a full time job she was qualified to perform that was also within her restrictions. Therefore, she decided to continue improving her skills by staying in school. She had started secretarial classes in January of 1999 while she was still receiving TTD. Although claimant's job search activities were temporarily limited or modified by her decision to attend school, considering all the circumstances, the Appeals Board concludes claimant did make a good faith job search. The vocational testimony given by Monty Longacre together with claimant's testimony concerning her job search efforts establish that claimant would have difficulty finding work within her restrictions without additional training and that the secretarial training will enable claimant to earn a higher wage. Under these circumstances going to school instead of working full time is good faith. Therefore, for purposes of determining claimant's permanent partial general disability, the post-injury wage that claimant was capable of earning after she was released to return to work with permanent restrictions should not be imputed. Because claimant's post-injury wages were not at least 90 percent of the pre-injury average weekly wage, claimant's permanent partial general disability should be based upon a work disability. Based upon claimant's actual post accident wage of $75 per week, her wage loss is 78 percent.

11. Respondent argues claimant should be denied a work disability award because she quit her job without first giving respondent an opportunity to accommodate her restrictions. Generally, an injured worker should request accommodations from her employer. But in this case that was not possible at the time claimant quit because she did not have restrictions at that time. Moreover, claimant was incapable of continuing to work. Beginning with the date claimant quit, she received TTD for 68 continuous weeks. Although respondent disputes that claimant's injury was related to her employment, respondent does not dispute that claimant was temporarily and totally disabled for those 68 weeks. Claimant was not released to return to work until October 1, 1999. She asked respondent for accommodated work on February 8, 2000. Her request was refused. Claimant certainly could have, and probably should have requested accommodated employment sooner. But respondent was aware of claimant's ongoing medical treatment. Respondent was providing that treatment and knew when Dr. Pratt determined claimant had reached MMI, gave her permanent work restrictions and released her to return to work. Nevertheless, respondent did not contact claimant about returning to work. Furthermore, although respondent knew claimant was unemployed, respondent did not offer claimant any job placement assistance. Under prior law, vocational rehabilitation would have been mandatory when the injured worker was disabled and off work for the length of time claimant had been. It is still a primary purpose of the Workers Compensation Act to restore the injured employee to work at a comparable wage. Only now the respondent is given the option of whether or not to provide vocational rehabilitation. A claimant can still request vocational rehabilitation services, but without respondent's agreement it is provided at the claimant's own expense.[9] This is a benefit very few unemployed claimants are able to afford.

12. In this instance, claimant's expression of interest in an accommodated job was late in coming, but the delay does not rise to the level of constituting bad faith or a failure to make a good faith effort. Furthermore, even though claimant advised respondent she was leaving work due to her back injury, respondent made no offer to claimant for any accommodations. After respondent acquired knowledge of claimant's specific restrictions, respondent never offered claimant a job which would accommodate those restrictions and never offered vocational or job placement assistance. Claimant looked for work on her own and she applied for job placement assistance with the Kansas Department of Social and Rehabilitation Services (SRS). That agency determined claimant was in need of training.

13. Although claimant had no preexisting restrictions, the ALJ disallowed the task loss opinions of Dr. Pratt and Dr. Delgado because the doctors were not asked to decide whether any of the relevant work tasks would have been eliminated by any permanent disability that may have resulted from claimant's previous employment. This was error. The work disability formula provided by K.S.A. 1997 Supp. 44-510e(a) requires

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[9] K.S.A. 44-510g.

consideration be given to all "the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident." When the disability was found to be an aggravation of a preexisting condition, a deduction for any preexisting disability is to be made pursuant to K.S.A. 1997 Supp. 44-501(c). It provides for a reduction in the disability award "by the amount of functional impairment determined to be preexisting." It is respondent's burden to prove the amount of claimant's preexisting functional impairment, if any. Although claimant's preexisting condition may have contributed to the injury[10] claimant suffered while working for respondent, the credible evidence stops short of proving that claimant had a ratable impairment at the time respondent hired her.

14. The Board finds that claimant's work disability is 77 percent, based upon a 78 percent wage loss and a 76 percent tasks loss.[11] The Board finds claimant's functional impairment is 5 percent.

AWARD

WHEREFORE, the Appeals Board finds the Award dated June 20, 2000 entered by Administrative Law Judge Bryce D. Benedict should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Vicky L. Parrish, and against the respondent, Russell Stover Candies, and its insurance carrier, Hartford Accident & Indemnity, for an accidental injury which occurred May 15, 1998 and based upon an average weekly wage of $322.00 for 68 weeks of temporary total disability compensation at the rate of $214.68 per week or $14,598.24, followed by 278.74 weeks at the rate of $214.68 per week or $59,839.90, for a 77% permanent partial general disability, making a total award of $74,438.14.

As of December 22, 2000, there is due and owing claimant 68 weeks of temporary total disability compensation at the rate of $214.68 per week or $14,598.24, followed by 68 weeks of permanent partial compensation at the rate of $214.68 per week in the sum of $14,598.24 for a total of $29,196.48, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $45,241.66 is to be paid for 210.74 weeks at the rate of $214.68 per week, until fully paid or further order of the Director.

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[10] Hanson v. Logan U.S.D. 326, ___ Kan. App. 2d ___, 11 P.3d 1184 (2000).

[11] Claimant was unemployed between the time she was released and when she started doing the part time clerical work at the church. Therefore, her wage loss during this time was 100 percent. But including this in the award calculation would not change the amount of benefits.

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Brenden W. Webb, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director